SUPREME COURT, U. S.

NOV 12 1968

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IN THE

Supreme Court of the United States

724

CHARLES MARCUS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinion Below

This is a petition for a writ of *certiorari* to review a judgment of The United States Court of Appeals for the Second Circuit, entered on September 20, 1968, in the above-entitled case affirming petitioner's conviction in The United States District Court for the Southern District of New York of four counts of violating 26 U.S.C., Section 7201, and five counts of violating 26 U.S.C., Section 7206(1). The Docket Number in the Court of Appeals was 32230, and the Calendar Number was 568 of the September Term, 1967. A copy of the Opinion of the Court of Appeals is attached hereto as "Appendix A". The Opinion of the Court of Appeals has not yet been reported. There was no Opinion in the District Court.

Jurisdiction

This Court has jurisdiction to review the judgment of the Court of Appeals for the Second Circuit by a writ of

certiorari pursuant to Title 28, United States Code, Section 1254(1) (1959), 62 Stat. 928 (1948).

The United States District Court for the Southern District of New York had jurisdiction of this case pursuant to those provisions of Title 26, United States Code, under which petitioner was tried under Indictment No. 66 Cr. 375 of the United States District Court for the Southern District of New York.

Statement

The judgment of the United States Court of Appeals for the Second Circuit appealed from was entered on September 20, 1968. On October 7, 1968, petitioner moved in the Court of Appeals for a stay of the issuance of the mandate, pursuant to Rule 41 of the Federal Rules of Appellate Procedure, pending the filing by petitioner of a petition for a writ of *certiorari* in this Court. On October 25, 1968, petitioner's motion for a stay of the issuance of the mandate was granted. Attached hereto as Appendix "B" is a copy of the Order of the Court of Appeals for the Second Circuit staying the issuance of the mandate.

QUESTION PRESENTED NO. 1

Whether The Following Statement, Made By The Prosecutor In The Course Of His Summation Before The Jury Constituted A "Comment" On The Failure Of Petitioner To Testify At Trial Or Prior To Trial:

> "Mr. Marcus is not a stupid man. Nobody who could have run this operation is a stupid man. *Mr. Marcus, I submit to you, avoided every opportunity to testify under oath.* He may have felt erroneously that Mr. Ferrise could not take the stand to describe what happened, *but he was unwilling, I submit to you, to submit himself to any question and answer statement under oath once it became clear to him that he was under investigation.*" (Emphasis added)

Provisions of Law Involved

It is the position of the petitioner that the statement of the Prosecutor violated that portion of the Fifth Amendment to the United States Constitution which provides as follows:

> "Nor shall [any person] be compelled in any criminal case to be a witness against himself. . . ."

Statement of Facts Material to Consideration of First Question

Petitioner was tried before a jury in the United States District Court for the Southern District of New York, Judge Irving Ben Cooper presiding, under a twelve count indictment, four counts of which charged violations of 26 U.S.C., Section 7201 (Income Tax Evasion) and eight counts of which charged violations of 26 U.S.C. Section 7206 (1) (Subscribing False Corporate Income Tax Returns). In substantial part, the prosecution's case was based upon the contention that petitioner had earned income in the form of fees for cashing checks in excess of the income he had reported from that source. In support of this contention, the prosecution first offered evidence of the total amount of checks deposited in various bank accounts controlled by petitioner. With relatively inconsequential exceptions, however, no evidence was offered to establish that these checks had in fact been cashed by petitioner, and if they had been cashed by petitioner, what fee, if any, he received for such service. In order to establish the amount of income allegedly earned from the cashing of these checks, the Government offered the testimony of Special Agent Ferrise of the Internal Revenue Service to the effect that on several occasions during the course of oral interrogations, petitioner had admitted to him that every check deposited in petitioner's bank ac-

counts represented a check which he had cashed and that, in each case, he had received a fee of one-half of one percent (R. 1064-1065, 1076, 1087, 1092-1093, 1099).[1]

On cross-examination, Agent Ferrise testified that only once did he attempt to question the petitioner under oath with a stenographer present. He admitted that on that occasion he did not ask petitioner about the fees which he charged because, he said, that was not the purpose of that particular interrogation (R. 1131-1132). He further stated that Petitioner had refused to answer questions about corporate income. Ibid. In his summation, defense counsel, in an attack on the credibility of Agent Ferrise, made the following reference to Agent Ferrise's testimony:

> "Instead the Government asks you to draw the conclusion that he got one-half of one percent. On the basis of what? On the basis of an unsworn, unrecorded statement that Mr. Marcus is supposed to have made to Mr. Ferrise.
>
> "Strangely enough, on the one occasion when Mr. Marcus was testifying with a reporter present, so that exactly what he said could be transcribed, on that occasion Mr. Marcus didn't see fit to say anything at all about how he cashed checks. But Mr. Ferrise's testimony was that only five days earlier he had made all sorts of statements about how he was paid." (R. 1515).

Thereafter, the prosecutor, during the course of his summation to the jury, in what the Government claims was intended to be a reply to the foregoing comment by defense counsel, made the following statement:

> "Mr. Marcus is not a stupid man. Nobody who could have run this operation is a stupid man. Mr. Marcus, I submit to you, avoided every opportunity to testify under oath. He may have felt erroneously that Mr. Ferrise could not take the stand to describe

[1] References are to pages of the transcript of the trial.

> what happened, but he was unwilling, I submit to you to submit himself to any question and answer statement under oath once it became clear to him that he was under investigation.''

This statement, which was made approximately halfway through the summation, bears absolutely no relationship either to the material immediately preceding or immediately succeeding the statement.

Defense counsel, who had previously requested that the Court refrain from commenting in its charge on the failure of the petitioner to testify, did not object to the statement until the conclusion of the summation, at which time, outside the presence of the jury, he moved for a mistrial. This motion was denied by the trial judge. On appeal, petitioner unsuccessfully sought reversal of his conviction because of the prosecutor's comment.

Reasons Relied on for the Allowance of a Writ of Certiorari

It is the position of petitioner that the prosecutor's comment naturally and necessarily called to the attention of the jury petitioner's failure to testify at the trial, as well as his failure to testify fully during the Government's pre-trial investigation. Moreover, it created a false impression in the minds of the jurors that petitioner had, on several occasions prior to trial, refused to testify under oath when, in fact, petitioner did testify under oath on the one occasion when he was requested to do so, albeit that he did not answer all questions put to him. By virtue of this comment, defendant was deprived of his right not to be compelled to bear witness against himself, in violation of the provisions of the Fifth Amendment to the United States Constitution. This Court has held that a comment by a prosecutor on the failure of a defendant to testify at trial, is such a violation of that defendant's rights as

to require reversal of a conviction unless the prosecution can establish, beyond a reasonable doubt, that the error was "harmless". See, *e.g., Anderson* v. *Nelson,* 390 U.S. 523 (1968); *Chapman* v. *California,* 386 U.S. 18 (1967); *Griffin* v. *California,* 380 U.S. 609 (1965).

In addition, several courts, recognizing that one has a right to refuse to answer questions prior to trial, as well as during trial, have held that comment by the prosecution at trial to the jury on a defendant's failure to testify during investigation is also proscribed and is a ground for reversal. See, *e.g., United States* v. *Sprengel,* 103 F. 2d 876, 883 (3rd Cir. 1939); *Tomlinson* v. *United States,* 93 F. 2d 652 (D.C. Cir.), cert. denied 303 U.S. 642 (1937); *People* v. *Abel,* 298 N.Y. 333, 83 N.E. 2d 542 (1949). *Cf. United States ex rel. Romano* v. *Fay,* 360 F. 2d 389, 392 n. 2 (2d Cir. 1966).

The Court of Appeals rejected petitioner's contention that his conviction should be reversed because of the prosecutor's comment for the following reasons:

(1) When viewed in context, the prosecutor's comments are seen to have been directed at petitioner's failure to testify under oath during the investigation and the jury would not, contrary to the prosecutor's intent, "naturally and necessarily" construe the language as a "comment" on petitioner's failure to testify at trial;

(2) Defense counsel made no attempt to procure an instruction to the jury on the point to clarify any ambiguity;

(3) Any rule prohibiting comment on a pre-trial refusal to testify under oath was inapplicable because defense counsel, in his summation, had referred to petitioner's refusal to answer certain questions.

It is petitioner's position that the reasoning and conclusions of the Court of Appeals for the Second Circuit

are erroneous and in direct conflict with decisions of this Court and of several other Courts of Appeals.

This Court has held in *Chapman* v. *California, supra,* that although a prosecutor's comment on a defendant's failure to testify would not be an automatic basis for reversal of a conviction, such reversal would be required unless it appeared beyond a reasonable doubt, that the statement would not "naturally and necessarily" call the attention of the jury to the defendant's failure to testify. The language of the statement here objected to is so unequivocal and clear as to make it virtually impossible to deny that it called the jury's attention to petitioner's failure to testify. The prosecutor stated that petitioner "avoided every opportunity to testify under oath." No matter what the context, the meaning of that statement is beyond doubt.

Several Courts have held that statements much less direct would "naturally and necessarily" call the attention of the jury to the defendant's failure to testify. See, *e.g., Davis* v. *United States,* 357 F. 2d 438 (5th Cir. 1966) (statement by trial judge, in the course of cutting off cross-examination by defense counsel of prosecution witnesses, that defense counsel could put "your people" on the witness stand); *Carlin* v. *United States,* 351 F. 2d 618 (5th Cir. 1965) (statement by the prosecutor in the course of summation that defendant "has yet to say where he was—where he has gone insofar as the record is concerned—it is silent."); *Desmond* v. *United States,* 345 F. 2d 225 (1st Cir. 1965) (statement by the prosecutor to the jury, "Those are the facts, the evidence stands unimpeached and uncontradicted." The Court held the comment to be proscribed "unless it is apparent on the record that there was someone other than himself whom the defendant could have called. . . ."); *White* v. *United States,* 314 F. 2d 243 (D.C. Cir. 1962) (following statement by prosecutor: "The Government would also bring to your attention the fact that the defendant failed to take the

stand. No inference at all is to be given to you by the fact [*sic*] that he exercised this right. This is a very important right to the individual; it is an important right in our system of justice."); *Barnes* v. *United States,* 8 F. 2d 832 (8th Cir. 1925) (prosecutor in the course of summation stated, "The witness Pryor took the stand and testified he bought dope from these defendants, and not a human being has testified that in so testifying Pryor lied."). *Cf. McKnight* v. *United States,* 115 Fed. 872 (6th Cir. 1902) (holds discussion in front of the jury of failure of defendants to produce certain documents to be proscribed).

The conclusion of the Court of Appeals for the Second Circuit that the language used by the Prosecutor was not proscribed was even in conflict with earlier decisions of that Court. See, *e.g., United States ex rel. D'Ambrosio* v. *Fay,* 349 F. 2d 957 (2d Cir.), cert. denied 382 U.S. 921 (1965); *United States* v. *Curtiss,* 330 F. 2d 278 (2d Cir. 1964).

A further basis stated by the Court of Appeals for its decision was the failure of defense counsel to seek a clarifying instruction from the Court immediately after the statement was made by the prosecutor. No such request was made, obviously, because defense counsel did not wish further to highlight petitioner's failure to testify. Several Courts of Appeals have recognized that, rather than curing such a prejudicial statement, contemporaneous objection and instruction would merely aggravate the matter. See, *e.g., Fowler* v. *United States,* 310 F. 2d 66 (5th Cir. 1962); *Langford* v. *United States,* 178 F. 2d 48 (9th Cir. 1949); *Barnes* v. *United States,* 8 F. 2d 832 (8th Cir. 1925).

Moreover, petitioner had an absolute right to insist, as, in fact, he did, that no reference be made by the trial judge to his failure to testify. See, *Davis* v. *United States,* 357 F. 2d 438 (5th Cir. 1966); *cf. Griffin* v. *California,* 380 U.S. 609 (1965). That right should not be abrogated because

the Prosecutor improperly commented on his failure to testify.

Finally, the conclusion of the Court of Appeals approving the Prosecutor's statement to the extent that it constituted a comment on petitioner's failure to testify under oath prior to trial on the theory that it was a justifiable response to defense argument, is unwarranted by the facts and is in conflict with the case law.

In the first place, defense counsel merely pointed up by his question of Agent Ferrise and his comments during summation that petitioner had refused to discuss certain subjects and that he had not been questioned about certain other subjects on an occasion when *he did, in fact, testify under oath*. How can this be said to justify the completely erroneous and blunt statement, twice repeated by the prosecutor, that petitioner absolutely refused ever to submit to interrogation under oath. Indeed the record contains no indication that petitioner was ever even requested to testify under oath on any other occasion.

Secondly, it has been consistently held that an improper comment is not justified merely because it purports to be a reply to defense statements. See, *e.g., United States* v. *Curtiss,* 330 F. 2d 278 (2d Circ. 1964); *United States ex rel. Miller* v. *Follette,* 397 F. 2d 363 (2d Cir. 1968).

If the decision of the Court of Appeals is permitted to stand on this issue it will constitute a serious erosion of the principle of non-comment, particularly in its present application to the Prosecutor's reference to a failure to answer questions before trial.

QUESTION PRESENTED NO. 2

Whether Certain Statements Made By The Trial Judge In The Course Of His Instructions To The Jury So Prejudiced Petitioner As To, In Effect, Deprive Him Of A Fair Trial.

Statement of Facts Material to Consideration of Second Question and Reasons Relied on for the Allowance of a Writ of Certiorari

Several highly prejudicial errors were made by the trial judge in the course of his charge to the jury. The errors constituted a gross departure from accepted and usual standards, and their sanction by the Court of Appeals calls for an exercise of this Court's power of supervision.

A. The Charge on Standard of Proof.

Judge Cooper, in the course of instructing the jury with respect to the findings it had to make, gave the following instructions:

> "In the final analysis, then, if you find that the evidence respecting the defendant is as consistent with innocence as with guilt or that it is more likely that the defendant is innocent than guilty, then you should acquit him. If you find that the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty. On the other hand if you should find that the law has been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty." (R. 1624)

The effect of this instruction was to permit the jury to render a verdict of guilty if it concluded that the preponderance of the evidence was in favor of the government and no more; the language very clearly informed them that they were not required to find proof beyond a reasonable doubt.

The Court of Appeals for the Second Circuit in *United States* v. *Hughes,* 389 F.2d 535 (2d Cir. 1968) stated unequivocally that the charge quoted above was erroneous. The Court, in *Hughes* reached that conclusion despite the fact that, as here, Judge Cooper had elsewhere in his charge announced the proper standard of proof particularly since, in that case, as is true here, the erroneous statement appeared at the end of the charge.

In this case, however, the Court of Appeals concluded that the error was not "plain error" within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure and therefore that the failure of defense counsel to object at the conclusion of the charge precluded a consideration of the point on appeal.

It is the position of petitioner that the conclusion that this statement did not constitute "plain error" is an extreme departure from the meaning of that standard as it has been applied in other cases. Moreover, this error, when coupled with other errors contained in the charge, requires reversal even if it is not "plain error".

In the following cases, erroneous instructions with respect to burden of proof were held to be "plain error." *United States* v. *Byrd,* 352 F. 2d 570 (2d Cir. 1965) (failure properly to instruct jury as to standard of proof applicable to one element of case held to be plain error); *Cross* v. *United States,* 347 F. 2d 327 (8th Cir. 1965); *United States* v. *Pugliese,* 346 F. 2d 861 (2d Cir. 1965) (charge requiring defendant to establish entrapment beyond a reasonable doubt, rather than by a preponderance, held to be plain error); *Bird City Equity Mercantile Exchange* v. *United States,* 338 F. 2d 790 (10th Cir. 1964) (failure to charge that character evidence might create a reasonable doubt held to be plain error). See also *United States* v. *Vitiello,* 363 F. 2d 240, 243 (3rd Cir. 1966).

B. The Trial Judge Made a Statement in the Course of his Charge which, in Effect, Foreclosed Jury Consideration of the Most Hotly Contested Issue in the Case.

Although Judge Cooper did, in certain portions of his instructions to the jury, state to the jurors that they were the exclusive triers of the facts (R. 1589) the following statement, made thereafter in the charge effectively nullified all prior instructions on the subject:

> "The most burdensome, I would judge, issue with which you must wrestle is the one relating to wilfulness. *I think this is the crux of the case*; that is, whether the defendant knew that a substantial amount of additional tax was due, and that the failure of the defendant to report the additional income was wilful." (R. 1602) (Emphasis added).

By making this statement, Judge Cooper was, in effect, advising the jury that it could consider as clearly established that petitioner had, in fact, underreported his income. This statement virtually foreclosed jury consideration of the issue of underreporting. Additionally, it distorted for the jury the issues presented to it at the trial.

While the Judge advised that the issue of wilfulness was the "crux" of the case, in fact, virtually the entire prosecution case was concerned with establishing unreported income. Toward this end, the prosecution introduced into evidence voluminous documents purporting to establish the number of checks cashed and further introduced the testimony of several witnesses, including Special Agent Ferrise, the sole purpose of which was to establish the extent of the fees earned by petitioner from cashing checks, as well as from his accounting practice.

Perhaps, if the trial judge had merely expressed an opinion to the jury while making it clear that it was only his opinion and in no way binding upon them, the prejudice

might have been minimal. However, the manner in which his belief was expressed in this case practically determined the issue and was a gross departure from the normal practice sanctioned by this Court and various Circuit Courts of Appeal. See, e.g., *United States* v. *Gollin,* 166 F. 2d 123 (3rd Cir.), *cert. denied* 333 U.S. 875 (1948); *Dinger* v. *United States,* 28 F. 2d 548 (8th Cir. 1928); *Fryer* v. *United States,* 11 F. 2d 707 (7th Cir. 1926). The meaning of this issue was well expressed by the Court of Appeals for the Third Circuit in *United States* v. *Curzio,* 170 F. 2d 354 (3rd Cir. 1948), as follows:

> "We recognize the right of the judge to comment on the evidence and to give his personal opinion thereon, but this prerogative must be so exercised as to leave no doubt in the jurors' minds that the final determination of the fact rests with them." (170 F. 2d at 354).

C. The Effect of the Judge's Comment on Evidence Which He had Ordered Stricken Early in Petitioner's Three Week Trial had the Effect of Reminding the Jury of the Stricken Testimony.

The Government, on the fourth day of petitioner's 11-day trial, called one Joseph Frankel as a witness. After this witness persisted in a refusal to answer certain pertinent questions on cross-examination on the ground that answers might tend to incriminate him, Judge Cooper, on motion of defense counsel, ordered the testimony stricken and instructed the jury to disregard all of the testimony of the witness.

Thereafter, eight days later, during the course of his charge, at a time when Frankel's testimony probably had been forgotten by the jury, Judge Cooper made the following gratuitous remark:

> "You will recall that the testimony of witness Frankel was, pursuant to my order, stricken from

> the record in its entirety. In the main, his testimony related to Counts 8, 11 and 12. Accordingly, the Government has consented to the dismissal of Counts 8, 11 and 12, and so you need give them no further attention." (R. 1608)

This statement improperly reminded the jury of the stricken testimony and more important, created the clear impression that, but for the necessity of striking the witness' testimony, Counts 8, 11 and 12 would also have been proven. Moreover, the trial judge's reference was erroneous, because Frankel's testimony related directly also to Counts 3 and 4 of the indictment.

QUESTION PRESENTED NO. 3

Whether The Court Of Appeals, In Determining The Existence Of Adequate Corroboration of Petitioner's Admissions Applied Standards Different From Those Established By This Court.

As indicated earlier, the prosecution, in order to establish petitioner's income, relied principally on the testimony of Special Agent Ferrise that petitioner had admitted to him that petitioner had earned one-half of one percent on each and every check he cashed and that each and every deposit in the bank accounts controlled by petitioner represented a check cashed for that fee (R. 1064-1065, 1076, 1087, 1092-1093, 1099).

Additionally, Special Agent Ferrise testified that petitioner had admitted to him that he never suffered any losses in his business.

These admissions, going, as they did, to the heart of the prosecution's case, clearly required corroboration pursuant to earlier decisions of this Court. See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963); *United States* v. *Calderon*, 348 U.S. 160 (1954); *Smith* v. *United States*, 348 U.S. 84 (1954).

It was, in fact, conceded by both the Government and by the Court of Appeals that corroboration was required for Special Agent Ferrise's testimony.

It was, and still is, the position of petitioner that, by virtue of this Court's previous decisions, adequate corroboration requires independent evidence, either of the facts admitted, or of the commission of the crime.

The Court of Appeals in rejecting petitioner's contention that there was insufficient corroboration, adopted standards which the petitioner contends were clearly erroneous. In announcing the standard it was applying, the Court said as follows:

> ". . . It is settled that these admissions are not competent evidence unless they are corroborated by independent evidence tending to establish either that the admissions were reliable or that the crime charged was in fact committed. [citation] The government's evidence, particularly the testimony of numerous clients of Marcus, amply met both of these alternative standards.
>
> "Of course the government did not prove independently as appellant stresses, that Marcus charged a fee on each and every one of the thousands of checks he cashed or that he never sustained a loss on a check. But this was not the government's burden. . . . the prosecution needed only to provide the jury with a basis for concluding that the admissions had been made and were accurate."

It is clear that, in adopting the standards set forth in the foregoing quotation, the Court of Appeals disregarded this Court's holding in *Smith* v. *United States, supra,* that there must be independent evidence of the facts allegedly admitted. The Court of Appeals expressly stated that there was no independent evidence of the pertinent admissions, *i.e.* that all deposits represented checks cashed

for a fee of one-half of one percent. Such independent evidence is critical and its absence is fatal to the prosecution's position. The corroborative evidence relied on by both the prosecution and the Court of Appeals did no more than to establish that on certain occasions, petitioner cashed checks for a fee. That point, however, was never in dispute.

Indeed, it was conceded by the defense. None of the alleged corroborative evidence had the remotest logical tendency to establish the crucial facts allegedly admitted. The Court of Appeals used an improper standard in finding necessary corroboration contrary to this Court's opinions in the *Smith, Calderon* and *Opper* cases, *supra*. In each of those cases, there was either strong supporting testimony for the specific facts proved through admissions or else independent proof from another source that the income earned was in fact greater than that reported. In this case, there was no supporting proof whatsoever of the pertinent facts, nor was there any independent evidence that income had been unreported. Although the Court of Appeals does state that there was independent evidence that a crime was committed, the opinion makes no reference to any such evidence and, it is submitted, could not, for no such evidence exists. The only evidence tending to establish the admission of a crime is the testimony of the admissions.

CONCLUSION

For the foregoing reasons, it is apparent that the decision of the Court of Appeals for the Second Circuit in this case is, in numerous respects, in conflict with decisions of this Court and of several other courts of appeal on identical or similar issues and, for that reason it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Appendix A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 568—September Term, 1967.

(Argued July 22, 1968 Decided September 20, 1968.)

Docket No. 32230

UNITED STATES OF AMERICA,

Appellee,

v.

CHARLES MARCUS,

Appellant.

Before:

LUMBARD, *Chief Judge,*
FRIENDLY and HAYS, *Circuit Judges.*

Appeal by defendant from judgment of conviction for tax evasion and for filing false and fraudulent returns, 26 U. S. C. §§ 7201, 7206(1), after jury trial in United States District Court for the Southern District of New York, Irving Ben Cooper, *J.*, presiding.

Affirmed.

ABRAHAM D. SOFAER, Assistant United States Attorney (Robert M. Morgenthau, United States Attorney for the Southern District of New York, David M. Dorsen and Pierre N. Leval, Assistant United States Attorneys, on the brief), *for appellee.*

Appendix A

MORTON S. ROBSON, New York, N. Y. (Marshall, Bratter, Greene, Allison & Tucker and Michael E. Geltner, on the brief), *for appellant.*

LUMBARD, *Chief Judge*:

Charles Marcus appeals from his conviction on nine counts for tax evasion and for making false statements in tax returns filed by some of his wholly owned corporations. He received a prison sentence of one year and fines totalling $30,000 after a trial before a jury, Judge Irving Ben Cooper presiding. On appeal Marcus challenges the sufficiency of the evidence, numerous rulings on the admissibility of evidence, the refusal of the trial judge to grant a mistrial following certain remarks made by the prosecutor during summation, and the propriety of portions of the judge's charge to the jury. Since we find no error in the trial judge's rulings and conduct of the trial we affirm the conviction.

The first four counts of the indictment charged Marcus under 26 U. S. C. § 7201 with attempting to evade his personal income taxes by filing false and fraudulent returns for the years 1959 through 1962. The remaining counts charged Marcus under 26 U. S. C. § 7206(1) with making false statements in the tax returns of five corporations which he wholly owned and controlled: the Ben Frank, Inc., for the fiscal years ending January 31, 1960 and 1961; the Casa Trading Corp. for the years ending January 31, 1960 and 1963; the Taca Trading Corp. for the years ending January 31, 1960 and 1961; the Aritor Corp. for the year ending August 31, 1962; and the Baritor Corp. for the year ending August 31, 1962.

The evidence at trial showed that Marcus, a certified public accountant, had as his principal source of income

the business of cashing checks for a fee through 43 checking accounts which he maintained at 10 banks. Most of these accounts were in the names of the five corporations named in the indictment, but some were in the names of friends, some in the names of fictitious individuals and companies, and five accounts were in Marcus' own name. Marcus also used the checking accounts of businesses for whom he did accounting, concealing this activity by using the cash of the businesses for his check cashing and depositing the checks he cashed in the business accounts. The evidence showed that Marcus charged fees ranging from ½% to 3% for cashing checks. Although Marcus cashed more than ten million dollars of checks during the years 1959 through 1962 he claimed that he kept no books. Consequently the government established its case through the testimony of numerous witnesses from banks, persons for whom Marcus cashed checks, and persons whose accounts he used, and through the introduction of a large number of bank records.

Marcus told Special Agent Ferrise that he received a fee of ½% for his check cashing services. In computing Marcus' income the government applied this fee to his total check deposits, with the exception that a higher fee of up to 3% was applied to transactions in which clients testified they had paid this higher amount. To this total was added Marcus' income from interest on savings bank accounts and from his accounting fees. The government's computations showed that Marcus had underreported his taxable income for the years in question by amounts ranging from $9,000 to $26,000, as follows:

Year	Taxable Income Reported	Government's Computation	Deficiency
1959	$ 3,555.87	$12,618.81	$ 9,062.94
1960	$ 5,784.50	$18,191.92	$12,407.42
1961	$ 3,729.55	$19,326.05	$15,596.50
1962	$21,600.00	$48,136.43	$26,536.43

Appendix A

There is no merit in appellant's argument that the government's evidence was insufficient to establish beyond a reasonable doubt that Marcus underreported his income. A review of the record shows that there was an abundance of evidence to support the conviction. Appellant's argument to the contrary seems based on the mistaken premise that the government must establish the precise amount by which income was underreported. In fact the prosecution meets its burden when it shows that income was underreported by a substantial amount. *Swallow* v. *United States,* 307 F. 2d 81, 83 (10th Cir. 1962), *cert. denied* 371 U. S. 950 (1963); *Olender* v. *United States,* 237 F. 2d 859, 867 (9th Cir. 1956), *cert. denied* 353 U. S. 982 (1957).

The testimony of Special Agent Ferrise concerning certain admissions made to him by Marcus was vital to the government's case. Ferrise testified he had been told by Marcus that Marcus received a fee of ½% on each of the checks he cashed, that he deducted this fee at the time he cashed the checks, that he paid to himself the fees received by his corporations, and that he suffered no losses from bad checks. It is settled that these admissions are not competent evidence unless they are corroborated by independent evidence tending to establish either that the admissions were reliable or that the crime charged was in fact committed. *Smith* v. *United States,* 348 U. S. 147, 152-56 (1948). The government's evidence, particularly the testimony of numerous clients of Marcus, amply met both of these alternative standards.

Of course the government did not prove independently as appellant stresses, that Marcus charged a fee on each and every one of the thousands of checks he cashed or that he never sustained a loss on a check. But this was not the government's burden. The facts concerning the fees and the absence of losses were alleged to have been admitted by Marcus, and the prosecution needed only to provide the jury with a basis for concluding that the admissions had

been made and were accurate. There was ample evidence in the record to support these conclusions.

There is no merit in appellant's contention that his admissions to Agent Ferrise should have been excluded since he was not warned of his right to counsel. Marcus was not in custody and he was fully aware that his activities were the subject of a tax investigation. In these circumstances the holding of *Miranda* v. *Arizona,* 384 U. S. 436 (1966), does not apply. *United States* v. *Mackiewicz,* No. 32145, 2d Cir., July 10, 1968.

The trial judge properly refused to strike the testimony of witness Arthur Streit. Streit identified numerous checks which he said he had cashed with Marcus for a 2% fee. He claimed that he used Marcus' services in order to obtain cash with which to purchase goods from suppliers who would not accept checks. On these occasions Marcus would supply Streit with invoices in the name of fictitious companies for Streit's bookkeeping purposes. Streit testified that when he had been contacted by the Internal Revenue Service he informed Marcus of this fact, and that Marcus had told him to "get rid of the books."

On cross-examination counsel for Marcus attempted to establish that Streit's purpose in cashing checks was to evade income taxes rather than to obtain cash for purchases. After responding to some questions relating to his claimed cash purchases Streit invoked his right against self-incrimination and refused to answer several additional questions. It is urged by appellant that Streit's refusals to answer unduly restricted Marcus' right of cross-examination, and that consequently Judge Cooper erred in denying a defense motion to strike all of Streit's testimony. However, all of the seven questions dealt with years which are not involved in this prosecution and went only to Streit's credibility. Since the questions involved only "collateral matters or cumulative testimony concerning credibility," *United States* v. *Cardillo,* 316 F. 2d 606, 613 (2d

Cir.), *cert. denied* 375 U. S. 822 (1963), the defense motion was properly denied.

Defense counsel also sought to establish that the reason Streit called Marcus after being contacted by the Internal Revenue Service was fear concerning his own, and not Marcus' tax status. Streit refused to answer a question concerning whether he had called Marcus because of his own fear he would be sent to prison for failing to pay tax on the checks Marcus had cashed for him. But this refusal to answer resulted in no prejudice to defendant's right of cross-examination for Streit had answered two very similar questions previously.

Appellant also claims that the trial judge committed reversible error in refusing to declare a mistrial because of remarks made by the prosecution during summation, remarks which are said to have been improper reflections on Marcus' failure to testify at the trial and on his refusal to answer questions during the government's investigation. We do not agree that the prosecutor's remarks could have been taken by the jury as a comment on defendant's failure to take the stand at trial, and we hold that under the circumstances the comment on defendant's refusal to answer questions before the trial was proper.

Special Agent Ferrise's testimony concerned admissions made by Marcus during an interview at which no stenographer was present. In an effort to attack Ferrise's credibility defense counsel in his summation laid heavy stress on the fact that at an interview with Ferrise five days after the alleged admissions were made, this time when a stenographer was present, Marcus had refused to discuss his check-cashing business. In addition it was pointed out that on two other occasions, when friends of his were present, Marcus had refused to talk with Ferrise. Thus the defense argument was that since Marcus had refused to answer questions with a stenographer present, and on the other two

occasions, the jury should conclude, contrary to Ferrise's testimony, that Marcus also had not answered questions at the earlier interview when a stenographer was not present.

The prosecution responded to the defense argument in these words:

> "Mr. Marcus is not a stupid man. Nobody who could have run this operation is a stupid man. Mr. Marcus, I submit to you, avoided every opportunity to testify under oath. He may have felt erroneously that Mr. Ferrise could not take the stand to describe what happened, but he was unwilling, I submit to you, to submit himself to any question and answer statement under oath once it became clear to him that he was under investigation."

Immediately following this statement the prosecutor went on to explain the two other instances in which Marcus had refused to talk to Ferrise as stemming from his anxiety that his friends not realize the size of his check-cashing activity.

Thus when viewed in context the prosecutor's comments are seen to have been directed at Marcus' conduct during the investigation—a rebuttal to the argument raised by the defense—rather than at his failure to testify at trial. And while the language of the prosecutor could have been more precise, this is not an instance where the jury, contrary to the prosecutor's intent, would "naturally and necessarily" construe his statement as a comment on defendant's failure to testify. *Morrison* v. *United States,* 6 F. 2d 809, 811 (8th Cir. 1925); cf. *United States ex rel. D'Ambrosio* v. *Fay,* 349 F. 2d 957, 958-61 (2d Cir.), *cert. denied* 382 U. S. 921 (1965). It should be noted that defense counsel did not attempt to secure an instruction from the trial judge which would have clarified any ambiguity present in the government's summation on this point. Indeed, counsel requested

the judge to make no comment whatever on the defendant's failure to testify and his right to remain silent.

But appellant also advances as a ground for mistrial the fact that the prosecutor's remarks were directed at Marcus' refusal to answer questions before a stenographer during the investigation. While there is authority to support the contention that comment upon a defendant's refusal to answer questions before trial is ground for a mistrial, see *United States* v. *Sprengel,* 103 F. 2d 876 (3rd Cir. 1939); *People* v. *Abel,* 298 N. Y. 333, 83 N. E. 2d 542 (1949), this cannot be the case when the subject was introduced to the jury by the defendant's own counsel. Once defense counsel had pointed to his client's refusal to answer questions in an attempt to undermine the credibility of a key government witness it was entirely proper for the prosecutor to respond by offering an alternative explanation for Marcus' prior silence. See *United States* v. *Nasta,* No. 32277, 2d Cir., July 17, 1968.

Finally, it is argued that Judge Cooper erred in his instructions in several respects. First, appellant points to the statement in the charge that "In the final analysis" the jury should acquit if from the evidence "it is more likely that the defendant is innocent than guilty. . . ." In *United States* v. *Hughes,* 389 F. 2d 535 (2d Cir. 1968),* we held that identical language used in a charge was error since it suggested to the jury that it apply a preponderance of the evidence standard. But Marcus' counsel made no objection to this language at trial, and Judge Cooper correctly instructed the jury concerning the government's burden of proof on numerous other occasions during his charge. (Record at 1592-95, 1599, 1600-01, 1605, 1623.) The one incorrect reference does not constitute plain error which we should recognize despite counsel's failure to object to it at trial. *United States* v. *Baratta,* No. 31744, 2d Cir., June 21, 1968.

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* *Hughes* was decided after the charge in this case was given.

Appendix A

Appellant also claims error in the following instruction concerning the element of wilfulness:

> "The most burdensome, I would judge, issue with which you must wrestle is the one relating to wilfulness. I think this is the crux of the case; that is, whether the defendant knew that a substantial amount of additional tax was due, and that the failure of the defendant to report the additional income was wilful."

Appellant argues that this charge effectively withdrew from the jury the issue of whether any income was unreported. We disagree. The jury had been fully instructed regarding the elements of the crime which it must find in order to return a guilty verdict. Judge Cooper's remarks could not have been taken to mean that his careful instructions on these elements were to be disregarded.

The other claims of error in the charge do not warrant discussion.

Judgment affirmed.

Appendix B

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 25th day of October, one thousand nine hundred and sixty-eight.

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UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CHARLES MARCUS,
Defendant-Appellant.

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It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated October 7, 1968 to stay the issuance of the mandate pending petition for writ of certiorari to the Supreme Court be and it hereby is granted.

/s/ HENRY J. FRIENDLY
/s/ PAUL R. HAYS
Circuit Judges

J. HENRY LUMBARD, Chief Judge, (Sic)
dissents (per HJF)